Supreme Court, U.S.
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No. 98-6

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1998

EL PASO NATURAL GAS COMPANY, A DELAWARE CORPORATION; CYPRUS FOOTE MINERAL COMPANY, A PENNSYLVANIA CORPORATION; AND CYPRUS AMAX MINERALS COMPANY, A DELAWARE CORPORATION,

PETITIONERS,

v.

LAURA NEZTSOSIE; ARLINDA NEZTSOSIE; AND ZONNIE MARIE DANDY RICHARDS, INDIVIDUALLY AND AS REPRESENTATIVE OF THE ESTATE OF HAROLD J. RICHARDS, SR.,

RESPONDENTS.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

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Price-Anderson Act, Pub. L. No. 85-256, 71 Stat. 576 (1957), as amended by the Price-Anderson Amendments Act of 1988, Pub. L. No. 100-408, 102 Stat. 1066 (1988) . . . . . *passim*

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ARGUMENT

Respondents all but ignore two central points of the petition for certiorari and of the well-reasoned dissent below:

One, the only claims respondents are asserting in tribal court are claims under tribal law, and the Price-Anderson Amendments Act clearly preempts such claims as a matter of substantive federal law. Hence, there is no surviving claim in tribal court to exhaust.

Two, this Court held in *Strate v. A-1 Contractors* that tribal courts lack adjudicatory jurisdiction over nonmembers' conduct in those instances where the tribe lacks jurisdiction to regulate the conduct. 117 S. Ct. 1404, 1413 & 1416 n.14 (1997). The Court also held, in a passage that respondents fail even to cite, that where it is plain that regulatory and thus adjudicatory jurisdiction is lacking, "the otherwise applicable exhaustion requirement must give way, for it would serve no purpose other than delay." *Id.* n.14 (internal citation omitted). Here, the federal government's exclusive regulatory authority with respect to nuclear activities forecloses application of tribal law. Hence, under *Strate*, the tribal courts have no adjudicatory jurisdiction, and exhaustion is not required.

The petition for certiorari should be granted. The opinion below seriously undermines both Congress' mandate that nuclear torts be governed exclusively by a federal-law regime, and this Court's teachings in *Strate* on the limits of tribal jurisdiction and the exhaustion doctrine as applied to nonmembers.

A. The Ninth Circuit's Decision Is Manifestly Erroneous.

1. Respondents stress that Price-Anderson does not explicitly address tribal-court jurisdiction over nuclear torts. But, that is irrelevant in light of a more basic point: Price-

Anderson *does* unequivocally preempt, as a matter of substantive law, *all* nuclear-tort claims that are not based on that federal statute. Thus, the claims that respondents seek to pursue in tribal court, which are entirely tribal-law claims as to which respondents themselves maintain Price-Anderson has no relevance,[1/] have been preempted by federal law.

The preemption is explicit because the Price-Anderson Amendments Act states that "any suit" brought in the United States for a nuclear tort "shall be deemed to be an action arising under section 2210 of this title." 42 U.S.C. § 2014(hh). Congress' objective was to expand Price-Anderson's regulatory provisions "to effect uniformity, equity, and efficiency" in resolving nuclear tort litigation. *In re TMI Litig. Cases Consol. II*, 940 F.2d 832, 857 (3d Cir. 1991); *see* H.R. Rep. No. 100-104, pt. 1, at 18 (1987). Thus, the lower courts have uniformly held that a nuclear tort claim "is compensable under the terms of the Amendments Act or *it is not compensable at all.*" *TMI*, 940 F.2d at 854 (emphasis in original); *Nieman v. NLO, Inc.*, 108 F.3d 1546, 1553 (6th Cir. 1997); *O'Conner v. Commonwealth Edison Co.*, 13 F.3d 1090, 1099 (7th Cir. 1994); *Kerr-McGee Corp. v. Farley*, 115 F.3d 1498, 1504 (10th Cir. 1997), *cert. denied*, 118 S. Ct. 880 (1998).[2/] Very recently, the Eleventh Circuit joined this chorus of authority. *Roberts v. Florida Power & Light Co.*, 146 F.3d 1305 (11th Cir. July 22, 1998) (state causes of action dismissed as preempted by Price-Anderson).

[1/] At respondents' invitation, the tribal court held that "the Price-Anderson Act has no application to this case." Order Denying Defendant's Motions To Dismiss, Pet. at 4.

[2/] While claiming that our petition misrepresented *Farley*, respondents acknowledge the one holding of that case on which we relied: "What the Tenth Circuit actually held was that torts arising out of nuclear incidents are governed by Price-Anderson." Opp. at 5 n.2. We agree.

In resisting preemption, respondents rely heavily on an argument that Price-Anderson claims are governed by state substantive law (Opp. at 4, *citing* 42 U.S.C. §§ 2014(hh)) and, in some instances, may be litigated in state courts (Opp. at 5). The first point materially mischaracterizes Price-Anderson, which -- as a matter of *federal* law -- simply borrows elements of state law and, within that regime, makes the borrowed state rules subservient to the substantive, procedural, and remedial rules of Price-Anderson itself. 42 U.S.C. § 2014 (hh) (state law does not apply to the extent "inconsistent with the provisions of [this Act]"). Thus, Price-Anderson claims are federal causes of action and governed fundamentally by federal law.[3/] Given that Price-Anderson allows only "the law of the *State*" where the tort occurred to supplement federal law (42 U.S.C. § 2014(hh) (emphasis added)), the application of any *other* law, such as tribal law, is foreclosed.

Nor is it material that, in limited circumstances, a Price-Anderson claim may be litigated in state courts. Such instances will be rare, because Price-Anderson includes an absolute right of removal from state to federal court (42 U.S.C. § 2210(n)(2)), as well as provisions under which the Nuclear Regulatory Commission or the Department of Energy may "take charge of [an] action" and -- even over objection of the parties -- obtain its removal where a federal indemnity claim is at issue. *Id.* §§ 2210(h) & 2210(n)(2). But most importantly, even if a case remains in state court because no one requests removal, the substantive and remedial federal-law

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[3/] *See, e.g., TMI*, 940 F.2d at 851-60 (Price-Anderson claims are federal causes of action within the federal-law jurisdiction of Article III courts); *Roberts v. FPL*, 146 F.3d at 1308 ("federal [and not state] safety regulations conclusively establish the duty of care owed in a public liability action"); *O'Conner*, 13 F.3d at 1100 (Price-Anderson "create[d] a new and entirely federal cause of action") & 1105 ("application of something other than the federal safety regulations as a standard of care [in a nuclear tort suit] is inconsistent with the Price-Anderson scheme").

provisions of Price-Anderson will govern nonetheless. *Id.* § 2014(hh). For example, federal safety standards -- rather than state tort theories -- would define the relevant standard of care. *See* note 3 *supra*.

Price-Anderson therefore makes clear that respondents' tribal-law claims do not and cannot exist as substantive causes of action. A requirement that those preempted claims be exhausted "would serve no purpose other than delay" (*Strate*, 117 S. Ct. at 1416 n.14) and indeed would border on harassment (*see National Farmers Union Ins. v. Crow Tribe*, 471 U.S. 845, 856 n.21 (1985)). As Judge Kleinfeld observed in his dissent: "There can be no claim for which exhaustion in tribal court can be required." Pet. App. at 22a.

2. Respondents argue that "well-established principles of federal law hold that Indian tribes cannot be divested of jurisdiction in the absence of an express and specific Congressional enactment." Opp. at 5. However, Price-Anderson *is* both express and specific in providing that all nuclear tort clams in the United States are to be governed by that statute. Claims under tribal law need not be singled out independently, for "it is now well settled . . . that a general statute in terms applying to all persons includes Indians and their property interests." *Federal Power Comm'n v. Tuscarora Indian Nation*, 362 U.S. 99, 116 (1960).[4/]

[4/] *See also Reich v. Mashantucket Sand & Gravel*, 95 F.3d 174, 179 (2d Cir. 1996) ("tribal power, even regarding exclusively internal conflicts, may be limited by treaty or federal statute, . . . including statutes that are silent as to Indians"); *Lazore v. C.I.R.*, 11 F.3d 1180, 1188 (3d Cir. 1993) (rejecting Indian's claim to tax exemption based on "the since-discredited rule that general acts do not apply to Indians in the absence of a clear Congressional intent to the contrary"); *Lumber Indus. Pension Fund v. Warm Springs Forest Prods. Indus.*, 939 F.2d 683 (9th Cir. 1991) (ERISA applies to tribal entities notwithstanding absence of explicit congressional directive); *U.S. Dep't of Labor v. OSHRC*, 935 F.2d 182 (9th Cir. 1991) (OSHA applies to tribal entities notwithstanding absence of explicit (continued...)

The phrase in *National Farmers Union* used to identify one exception to the tribal-exhaustion doctrine -- "violative of express jurisdictional prohibitions" (471 U.S. at 856 n.21) -- does not imply that Price-Anderson must explicitly reference tribal courts. A central holding of *Strate* was that the tribal-exhaustion principles of *National Farmers Union* and its progeny do not expand a tribe's limited substantive authority to regulate the conduct of nonmembers (117 S. Ct. 1410 & 1413), and in no event can a tribe's adjudicatory jurisdiction exceed its regulatory jurisdiction (*id.*). The *Strate* Court also made clear that the three exceptions to tribal exhaustion identified in *National Farmers Union* were not all-inclusive (*id.* at 1416 n.14[5/]) and that any otherwise applicable exhaustion requirement must yield where (as here) the tribe lacks regulatory jurisdiction over the subject of the dispute (here, nuclear safety) and, as a consequence, also lacks adjudicatory jurisdiction. *Id.* Respondents' opposition ignores both this clarification of *National Farmers Union* and Price-Anderson's express preemptive effect.

3. Like the panel majority below, respondents seek to limit *Strate* to its particular facts. They argue that its teachings are confined to the situation where tribal legislative

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[4/](...continued)

congressional directive); *Blue Legs v. B.I.A.*, 867 F.2d 1094, 1097-98 (8th Cir. 1989) (RCRA's provision that "[a]ny action" be brought in federal court precludes tribal-court jurisdiction and obviates any exhaustion requirement).

[5/] The Ninth Circuit belatedly recognized this fact in its order amending its original opinion. Pet. App. at 25a (adding a fourth exhaustion exception on the basis of *Strate*, although misstating the scope of that exception).

jurisdiction is wanting because of *territorial* considerations[6/] rather than for some other reason. Opp. at 14-15. There is no principled basis for this limitation. A tribe's regulatory authority over nonmembers is subject to both territorial and substantive limitations,[7/] and Congress has broad authority to adjust either parameter. If, for example, Congress were to legislate that Indian tribes could not regulate marriages or divorces involving nonmembers (even those residing in a reservation), it would be folly to conclude that *Strate* was inapplicable and that tribal court proceedings had to be exhausted in a divorce dispute between nonmembers when Congress had clearly preempted the application of tribal law.

Likewise here, Congress has decided that only federal law should govern issues of nuclear safety, and that any tort claims arising from nuclear-related activities should be governed by a federal-law regime (which in turn borrows certain state but not tribal substantive rules). Accordingly, *Strate* is directly applicable: tribes lack regulatory jurisdiction over the subject matter of nuclear torts, and hence they lack adjudicatory authority. And, under another *Strate* holding equally applicable here, the doctrine of exhaustion of tribal remedies must therefore give way.

[6/] The highway right-of-way in *Strate*, although inside a reservation, had been transferred to State control. The mine sites here, while on reservation land leased from the Navajo Nation, were operated under federal license and contracts.

To clarify the facts here, El Paso's subsidiary (but not El Paso itself) operated several such mine sites between 1956 and 1959. *See* Pet. App. at 3a. The 1957-1968 dates stated at Pet. 2 reflect respondents' allegations in tribal court, but not findings of fact.

[7/] For example, tribes lack sovereign authority to exercise criminal jurisdiction over nonmembers, even for crimes committed on reservation land. *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978).

4. Finally, respondents attempt to defend the Ninth Circuit panel's *sua sponte* assertion of jurisdiction over an injunctive order from which respondents neither appealed nor cross-appealed. Opp. at 15-17. Each of the cases that respondents cite are inapposite for each involved appellate disposition of an order that had been properly appealed; appellate jurisdiction was not even an issue. Here, on grounds of "comity," the Ninth Circuit purported to take jurisdiction over an unappealed injunction. As demonstrated in our petition (Pet. at 16-18), such action was contrary to well-established precedents.

B. Review by this Court Is Necessary and Warranted.

The divided Ninth Circuit panel failed to honor a congressional mandate that nuclear torts be subject exclusively to a federal regime, brushed aside the rulings of other circuits on the preemptive effect of Price-Anderson, imposed a tribal-exhaustion requirement against nonmembers in circumstances where exhaustion will serve no purpose other than delay, distinguished *Strate* by shoe-horning it into a narrow and illogical box, and created a new and dangerous theory that "comity" considerations justify the assertion of appellate jurisdiction over unappealed orders. These are significant issues, implicating the effectiveness of the Price-Anderson Act, the impact of the tribal-exhaustion doctrine, and the clarity of heretofore unambiguous principles of appellate jurisdiction.

Respondents assert that, nonetheless, certiorari should be denied because the tribal-exhaustion issue is similar to that presented in *Kerr-McGee v. Farley*, for which certiorari to the Tenth Circuit was denied last Term. Opp. at 3-4. But, the fact that the errors of *Farley* have now spread to the Ninth

Circuit is hardly an argument for inaction.[8/] The problem is recurrent, with additional suits in tribal court expected to be filed. More broadly, the Ninth and Tenth Circuits continue to apply a rigid exhaustion requirement uncalled for by this Court's opinions and contrary to the holdings of *Strate*.

Also unpersuasive is respondents' argument (Opp. 6-7) that ultimately, after years of litigation in tribal courts, the federal courts will have a second opportunity to consider whether the tribal claims were indeed preempted. Even assuming that the federal courts ultimately will have an unconstrained opportunity to assess the correctness of tribal-court judgments dealing with nuclear torts (at that time, respondents undoubtedly will argue for a very limited federal-court role), prolonged and expensive litigation would nonetheless have occurred, and petitioners (nonmembers of the tribe) would have been subjected to tribal adjudication of tribal-law claims without any timely federal-court resolution of the threshold issues of jurisdiction and the preemptive effect of Price-Anderson. Congress' objective "to effect uniformity, equity, and efficiency" in resolving nuclear tort litigation (*TMI*, *supra*, 940 F.2d at 857) would have been frustrated, and the proper bounds of tribal jurisdiction over nonmembers would have been breached.

[8/] As previously noted, moreover, the Tenth Circuit took a more defensible approach than has the Ninth as to the substantive scope of Price-Anderson. *See* note 2 *supra*.

CONCLUSION

Accordingly, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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